Filed April 3, 1945

In the District Court of the United States for the Northern District of Alabama, Southern Division

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CIVIL ACTION No. 5610

ALABAMA HIGHWAY EXPRESS, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3 of the Revised Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,[1] entered March 5, 1945, of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint to set aside an order of the Interstate Commerce Commission. The Commission's report and order, dated July 27, 1944, granted appellant a certificate

[1] The Court also made findings of fact and conclusions of law.

of public convenience and necessity under the "grandfather" clause of Section 206 (a) of Part II of the Interstate Commerce Act (49 U. S. C. 306 (a) to operate as a common carrier by motor vehicle of general commodities, with exceptions not here important, over irregular routes as follows:

> (a) Between all points in Alabama within 65 miles of and including Birmingham, on the one hand, and, on the other, Louisville, Ky., and New Orleans, La.; all points in Indiana, Mississippi, and Tennessee; all points in that part of Florida on and bounded by a line beginning at Clearwater, Fla., and extending along Florida Highway 17 to Tampa, Fla., thence along U. S. Highway 92 to Orlando, Fla., thence along U. S. Highway 441 to the junction of U. S. Highway 41, thence along U. S. Highway 41 to the junction of U. S. Highway 129, thence along U. S. Highway 129 to the Florida-Georgia State line, thence along the Florida-Georgia State line to the Florida-Alabama State line, thence along the Florida-Alabama State line to the Gulf of Mexico, and thence along the Gulf of Mexico to the point of beginning; all points in Georgia on and west of U. S. Highway 129; all points in that part of Illinois on and bounded by a line beginning at the Indiana-Illinois State line and extending along U. S. Highway 36 to Springfield, Ill., thence along Illinois Highway 29 to Peoria, Ill., thence along Illinois Highway 116 to Metamora,

Ill., thence along Illinois Highway 89 to the junction of U. S. Highway 34, and thence along U. S. Highway 34 to Chicago, Ill., thence along Lake Michigan to the Illinois-Indiana State line, and thence along the Illinois-Indiana State line to the point of beginning; and all points in that part of Ohio on, west, and north of a line beginning at a point on the Ohio-Pennsylvania State line, near Sharon, Pa., and extending along U. S. Highway 62 to Columbus, thence along U. S. Highway 23 to Circleville, Ohio, and thence along U. S. Highway 22 to Cincinnati, Ohio; and

(b) Between Mobile, Ala., on the one hand, and, on the other, all points in Alabama.

The Commission's order, however, denied appellant's application in so far as it claimed the right to operate as a common carrier of general commodities between an enlarged base area embracing all points within the State of Alabama, on the one hand, and, on the other, the points and territory outside of Alabama above-mentioned. As heretofore set forth, the order limited the base area to "all points in Alabama within 65 miles of and including Birmingham." The appellant does not claim that the limitations in respect of operations to and from points and territory outside of Alabama were erroneously imposed by the Commission. Other provisions of the Commission's report and order are not attacked in this action.

Service of the appeal papers upon appellees was not effected within the 5-day period prescribed by Rule 12, paragraph 2 of the Revised Rules of the Supreme Court, for it was not until March 19, 1945, that the appeal papers were received by appellees. A statement directing attention to Rule 12, paragraph 3 of such Rules was not served upon appellees, as prescribed by paragraph 2 of that Rule. Further, it does not appear that notice of appeal was served upon the Attorney General for the State of Alabama, in accordance with the provisions of the United States Code, Title 28, Section 45a.

The report and order of the Commission here attacked were issued on reconsideration, at the appellant's request, of an earlier report of the Commission, dated July 6, 1942, (attached to appellant's complaint as Exhibit D—not to be printed in full in the permanent series of motor carrier reports of the Interstate Commerce Commission) which had also denied appellants authority to operate as a common carrier of general commodities between all points in Alabama, as a base area, on the one hand, and, on the other, points and territory outside of Alabama. Although appellant's praecipe now attempts to bring before the Supreme Court the evidence before the Commission, that evidence, except for one exhibit, was not made a part of the record before the district court (see Fdg. 6). Accordingly, the Commission's findings of fact must be assumed to be supported by evidence,

and the only question is whether the Commission's decision based on the findings is erroneous in law. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286, and cases cited.

The basis for the Commission's action in refusing to grant the additional authority sought is indicated by the following statement from its opinion on reconsideration:

> *Alabama:* Authority is sought to serve all points in Alabama in connection with operations to and from points in the States described in footnote 3. As shown in the appendices hereto, applicant's abstract of shipments transported prior to June 1, 1935, discloses approximately 743 shipments moving to or from points in Alabama, of which approximately 253 were out-bound, and approximately 490 were in-bound. After the statutory date, approximately 4340 shipments were transported to or from points in Alabama, of which approximately 1750 were out-bound, and approximately 2590 were in-bound. Of the 743 shipments transported prior to June 1, 1935. 566, or about 76 percent, moved from or to 14 scattered points in Alabama within 65 miles of and including Birmingham, and about 20 percent moved to or from Mobile, Montgomery, and Wetumpka. Of the 4340 shipments transported after the statutory date, 3558, or about 82 percent, moved from or to the same points in the 65-mile Alabama territory, and about 11 percent moved to or from Mobile, Montgomery, and Catherine, Ala-

bama. Catherine was served only once during 1934 and the first five months of 1935, and Wetumpka was served only nine times after the statutory date, during a period of about four years. However, the evidence establishes that prior to and continuously since the statutory date applicant has served a number of widely scattered points within 65 miles of and including Birmingham in connection with its common carrier operations to and from points in other States. True, a large number of points in such territory were not served prior to June 1, 1935, but enough were served to be representative of the whole, and to show the fulfillment of a purpose to provide a transportation service therein. Viewing applicant's operations within the described Alabama territory as a whole, we are of the opinion that they have been of such substantial nature since prior to the statutory date as to warrant the granting to it of authority to continue operations between all points in such territory, on the one hand, and, on the other, points in described territories in other States. The scope of applicant's operations in the other States is hereinafter treated under separate captions. The extent of applicant's operations between Mobile and Montgomery and points in other States is somewhat narrower both as to number of shipments transported and points served. Between January 1, 1934, and June 1, 1935, applicant transported 13 shipments to Mobile, including one from

one point in Ohio, eight from one point in Tennessee, three from one point in West Virginia, and one from one point in Georgia. In the reverse direction, 20 shipments were transported from Mobile, including two to one point in Georgia, three to two points in Illinois, two to two points in each of Indiana, Kentucky, and Mississippi, one to one point in Missouri, four to three points in Ohio, and four to two points in Tennessee. To Montgomery, 29 shipments were transported, including five from one point in Florida, four from two points in each of Tennessee and Illinois, six from two points in Indiana, two from one point in Kentucky, one from one point in each of Georgia, Louisiana, and New Jersey, two from two points in Ohio, and three from one point in West Virginia. No shipments were transported in the reverse direction from Montgomery. It is clear that the service performed prior to the statutory date between Mobile and Montgomery and points in the States indicated has been sporadic in character, insubstantial in respect of shipments transported, and limited as to number of points served. In comparison with the total number of shipments transported, operations to and from Mobile and Montgomery have been less substantial since the statutory date. Service at Catherine and Wetumpka appears to have been only incidental to applicant's principal operation, and such service is also lacking in essential substantiality and con-

sistency since prior to the statutory date. The limited, sporadic, and insubstantial service provided at Mobile, Montgomery, Catherine, and Wetumpka, since prior to June 1, 1935, does not warrant a grant of "grandfather" authority to serve these points, and we so find.

As appears from appellant's jurisdictional statement, the principal grounds of attack upon the Commission's order are that it acted arbitrarily and capriciously, in excess of its statutory power, and contrary to the indisputable character of the evidence, in limiting the appellant's base area to less than the State of Alabama, and that it misapplied the law to the indisputable facts as shown by the order of the Commission and the record in this case. It is submitted that these contentions present no substantial question and that the decree of the District Court should therefore be affirmed without argument.

The legal standard to be employed by the Commission in determining the geographical scope of operations during the "grandfather" period is prescribed by the Supreme Court in *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 480–481. There it was said that the Act provides the test of "bona fide operation" which connotes "substantial as distinguished from incidental, sporadic or infrequent service," and that "the precise delineation of the area or the specification of localities which may be serviced has been entrusted by

the Congress to the Commission." See also *Howard Hall Co.* v. *United States,* 315 U. S. 495, 498–499, and *Jack Cole Company, Inc.,* v. *United States,* decided by the District Court for the Northern District of Alabama, Southern Division, on September 7, 1944, motion to affirm granted by the Supreme Court on February 12, 1945. It is plain from the above-quoted portions of the Commission's report that it applied this standard. It cannot be said that as a matter of law the Commission was required to hold that the sporadic service to a few points outside the Birmingham area was sufficient to entitle appellant to the enlarged grandfather certificate which it seeks.

Since the Commission has thus applied the correct legal test, its findings as to substantiality of the service in particular areas must be sustained unless patently in error on their face. *Alton R. Co.* v. *United States,* 315 U. S. 15; *United States* v. *Carolina Carriers Corp., supra,* 482–483. So far as the limitation to the Birmingham base area here involved is concerned, it is significant that the Supreme Court has sustained two other Commission decisions restricting the size of this same base area. *Howard Hall Co.* v. *United States, supra,* 498–499; *Jack Cole Company, Inc.,* v. *United States, supra.* In a particularly painstaking report the Commission has analyzed in detail the evidence with respect to every point and area involved. The Commission found that ap-

pellant's operation to and from points in Alabama, except to and from points within 65 miles of and including Birmingham, were lacking in essential substantiality and consistency. The District Court's conclusion that the Commission's findings supported the order is clearly correct and should be sustained.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

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U. S. GOVERNMENT PRINTING OFFICE: 1949